United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4213

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4213

SOCIALIST WORKERS PARTY, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION,

and

UNITED STATES OF AMERICA,
Respondents.

ON REVIEW FROM THE
FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF THE ISSUE PRESENTED*

Whether the Commission erred in its construction of the "on-the-spot coverage" exemption, 47 U.S.C. 315(a)(4), which applied the exemption to certain candidate debates.

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*/ This case has not been previously before this Court.

COUNTERSTATEMENT

Petitioner Socialist Workers Party (SWP) and its candidates for President and Vice-President seek review of an order of the Federal Communications Commission. FCC 76-875 (adopted September 20, 1976; released September 22, 1976), in which the Commission upheld a staff ruling of September 20, 1976 denying SWP's request for time equal to that afforded President Ford and Governer Carter in the broadcast coverage of debates sponsored by the League of Women Voters.

Petitioners, in their complaint to the Commission, in no way alleged facts different from those presented in Aspen Institute, 1/ 55 FCC 2d 697 (1975), aff'd sub nom. Chisholm v. FCC, ___ F.2d ___, D.C. Circuit, Nos. 75-1951 and 75-1994, April 12, 1976, cert. pending, Nos. 76-101 and 76-205. Instead, they informed the Commission (Pet. App. A-9, A-10) that "[w]e believe that decision of the Commission was erroneous," and told the Commission that if it did not reconsider its decision in light of Judge Wright's dissent in Chisholm, SWP would seek judicial review. Thus, this petition for review was filed.

1/ In Aspen, the Commission's limited holding reversed on their facts--two 1962 decicions concerning debates--The Goodwill Station (WJR), 40 FCC 362, and National Broadcasting Co. (Wyckoff), 40 FCC 370.

1. Background: The Commission's 1962 and 1964 rulings.

Section 315 was amended in 1959 to permit broadcast licensees to provide, among other exemptions, "on-the-spot coverage of bona fide news events" involving candidates for public office without having to afford equal time to all other rival candidates. 47 U.S.C. 315(a)(4). At the time of the amendment, Congress recognized that the Commission would continue to administer Section 315 by, among other means, "interpretations." S. Rep. No. 562, 86th Cong. 1st sess., 12.

Three years later the Commission was asked by Radio Station WJR in Detroit to issue an interpretative ruling concerning whether the following situation would qualify as a "bona fide news event" within the meaning of 47 U.S.C. 315(a)(4). During the 1962 Michigan gubernatorial campaign, the Economic Club of Detroit, a luncheon club which met weekly to hear dinner speakers and other programs, including occasional debates on controversial issues, sponsored a debate between Democratic Governor John Swainson and his Republican challenger, George Romney. A question and answer period followed the debate. A third candidate for governor from the Socialist Labor Party, which in the last election had received 1,479 votes in a state-wide total vote of 3,255,991, was not invited by the Economic Club.

It had been WJR's practice for the previous five years to broadcast live the weekly programs of the Economic Club. This practice was continued in the case of the Swainson-Romney debate.

Although the debate received widespread coverage in both regional and nationwide newspapers, and on radio and television newscasts, the Commission ruled that it was not a "bona fide news event" within the meaning of Section 315 (a)(4), and that WJR would, therefore, be required to honor the request of the Socialist Labor Party candidate for equal time. The Goodwill Station, Inc., 40 FCC 362 (1962). The Commission reached a similar conclusion with respect to a debate in California between Governor Brown and his Republican opponent, Richard Nixon, at the annual convention of the United Press International (UPI) in San Francisco. National Broadcasting Company, Inc. (Wyckoff), 40 FCC 366 and 370 (1962).

The Commission reasoned that it was not sufficient for purposes of Section 315(a)(4) that a licensee in good faith concluded that a debate constituted a news event which it wished to cover live. Instead, the Commission said that debates could not be exempt from the equal opportunities requirement because the appearance of the candidates was the event itself and not merely "incidental" to some other

news event. In support of its determination, the Commission relied on a House Committee Report in 1959 to the effect that "the principal test was 'whether the appearance ... is incidental to the on-the-spot coverage of a news event or whether it is for the purpose of advancing the candidacy of a candidate.'" 40 FCC at 364, 372-73.

2. The Aspen Petition.

On April 22, 1975, a petition was filed with the Commission by the Aspen Institute Program on Communications and Society (Aspen), seeking prompt action by the Commission to give the 1959 amendments to Section 315 their "proper remedial construction" in the case of certain joint appearances of political candidates. Specifically, Aspen attacked the Commission's opinions in NBC (Wyckoff) and Goodwill Station, supra, as constituting "a narrow, niggardly construction [of Section 315(a)(4)], rather than one fully promoting the broad, remedial purposes of the 1959 Amendment." Aspen said that the Commission's reasons for departing in the Economic Club and UPI debate situations from what Aspen regarded as the clear "common sense view of the phrase, 'on-the-spot coverage of bona fide news events,'" did not withstand analysis.

For example, the Commission had indicated that the principal test to be used in determining the exempt status of the Swainson-Romney and Brown-Nixon debates was whether the candidates' appearances were "incidental to" coverage

of the news event, 40 FCC at pp. 364, 372-73. Aspen pointed out that the "incidental test," which had appeared in 1959 in the original House of Representatives bill amending Section 315, had been dropped in conference and did not appear in the final bill, with one exception not relevant here. 2/ Moreover, the Commission had said it feared that a broad construction of Section 315(a)(4) would make meaningless the other three exemptions in Section 315(a) and the subsequent legislation in 1960 suspending Section 315 to permit the Kennedy-Nixon debates, 40 FCC at 371-72. Aspen said that such a fear ignored the fact that the other exemptions for bona fide news interviews and documentaries and the 1960 suspension were needed to permit coverage of studio events which would not qualify as non-studio on-the-spot coverage of news events.

Finally, with respect to the Commission's fear in 1962 that a liberal construction of the "on-the-spot" exemption would carve a large hole into the equal time requirement, 40 FCC at 371, Aspen reminded the Commission that Congress in 1959 had manifested a clear willingness to take risks with the equal time philosophy to make it possible for broadcasters to cover political news to the fullest degree. 3/

2/ See 47 U.S.C. 315(a)(3).

3/ Aspen referred to Senator Pastore's remarks during the floor debate which evidenced the fact that "a calculated risk" was involved in attempting to make it possible to cover political news "to the fullest degree." 105 Cong. Rec. at

(footnote continued on next page)

Aspen asked the Commission, either in the context of its proceeding in Docket No. 19260 involving political broadcast issues or by issuance of new policy statement or declaratory ruling, [4/] to reverse its narrow interpretation of Section 315(a)(4). It urged that whatever action was to be taken by the Commission should be taken swiftly:

> What is crucial is that the Commission act promptly to resolve these important matters, so that broadcasters, candidates, and the public can be definitively informed of the ground rules well before the 1976 campaign.

On September 12, 1975, the Media Access Project (MAP), on behalf on Congresswomen Shirley Chisholm and NOW filed comments opposing Aspen's arguments. MAP argued that before the 1959 exemptions were added to Section 315, the Commission had held that debates were subject to the equal time requirement. Therefore, according to MAP's reasoning, a debate which was not exempt in 1958 because there were no

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3/ (footnote continued from previous page)
14445 (Sen. Pastore) and 14451 (Sen. Holland - Pastore exchange). It also noted that the Senate Report accompanying the 1959 legislation declared that the benefits of the bill "outweigh[ed] the risk [of favoritism] . . .by some partisan broadcasters," S. Rep. No. 562 at p. 10, and remarks of Senator Magnuson in 105 Cong. Rec. at 14444.

4/ The time for filing petitions in Docket No. 19260 had expired prior to receipt of Aspen's petition. For that reason, because of the need for action to be completed prior to the beginning of an election year, and because the request to overrule prior cases involved questions of law rather than policy, the Commission chose to make its determination in a declaratory order.

statutory exemptions would still not be exempt after the exemptions were created in 1959 by Congress. Moreover, because Congress knew of the prior FCC rulings and did not create a specific exemption for debates Congress could not have intended them to be exempt even if they might otherwise qualify under one of the enacted categories.

In addition, MAP argued that an event could be considered a "bona fide news event" under Section 315(a)(4) only when the candidate appearing at that event does not have the intent or design to serve his or her political advantage.[6/]

3. The Commission's Decision.

In its Memorandum Opinion and Order adopted on September 25, 1975, the Commission found that certain issues raised in the Aspen petition with respect to Section 315(a)(2) were not appropriate for resolution at this time.[7/] However, after considering Aspen's argument against its interpretation of Section 315(a)(4) in the 1962 debate cases, and the

6/ MAP offered no examples of when a candidate can be said to have appeared at an event without intending to serve his or her political advantage. MAP recognized that an appearance of a candidate at a political convention was expressly included within the reach of Section 315(a)(4). The intent of the candidate, argued MAP, would not be relevant if he or she appears at a political convention because the purpose of the convention is to nominate candidates. In all other cases, MAP argued, the "relevent intent" as to whether the candidate's appearance was not designed to serve his political advantage "is that of the candidate himself, not the broadcaster."

7/ Aspen had also asked the Commission to make it clear that the Section 315(a)(2) exemption for "news interview[s]" extended to situations where networks shifted their regularly scheduled news interview shows to prime time, expanded them from their usual half hour to a full hour and invited more than one candidate as guests.

contrary arguments of MAP, the Commission, by a 5-2 vote, concluded that its analysis in those cases was erroneous. Therefore, it indicated that if it were confronted again with the situations presented in the two 1962 cases, its rulings would be different.

Aspen had argued that the Commission's reasoning which led it to a narrow construction of the phrase "bona fide news events" excluding debates was faulty. Upon further reflection, the Commission agreed.

Thus, it noted that the earlier narrow interpretation had rested on language in a House committee report accompanying a bill which would have required appearances by candidates to be "incidental to" another event. However, the Commission now realized what it had failed to recognize in 1962, namely that the "incidental to" test had been stricken, with one exception not relevant here, [8] from the legislation finally enacted in 1959. (Para. 22). [9]

The Commission then turned to the remaining reasons for the 1962 decisions. Noting the language of the Conference Report that the appearances of the candidate not be which language had been stressed in the agency's 1963 interpretation, see 40 FCC at 363, "designed to serve the political advantage

8/ See footnote 2, supra, at p. 6 .

9/ Copies of the Commission's opinion in Aspen are being supplied to the Court.

of that candidate," the Commission turned to the explanation of Rep. Oren Harris, House Floor Leader for the Report:

> This requirement regarding the bona fide nature of the newscast, news interview or news events, was not included without thoughtful consideration by the conference committee. It sets up a test which leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. However, it is not intended that the exemption shall apply where such judgment is not exercised in good faith. For example, to state a rather extreme case, the exemption from section 315(a) would not apply where the program, although it may be contrived to have the appearance or give the impression of being a newscast, news interview, or on-the-spot coverage of news events, is not presented as such by the broadcaster, but in reality has for its purpose the promotion of the political fortunes of the candidate making an appearance thereon. 105 Cong. Rec. 17782.

(Para. 22, n.9). In the following paragraph, (Para. 23, n.10), the Commission said that Congress recognized that the appearance of a candidate at any event would serve his political interest, and that the language of the statute ("including but not limited to political conventions") indicated Congressional intent to exempt coverage of political events with conventions as a starting point rather than a limitation.

With respect to the earlier reliance on the argument that a broad construction of Section 315(a)(4) would swallow up the other three exemptions, the Commission observed that

its interpretation was confined to situations involving non-studio appearances (Paras. 10 - 11 and 28 (a)). Thus, an appearance by a candidate in a studio, unless otherwise exempt, would continue to require equal opportunity for other such candidates.

Similarly, other legislation would be needed to cover studio appearances such as the Great Debates in 1960. Moreover, the Commission declared that when Congress suspended Section 315 in 1960 for Presidential and Vice-Presidential candidates, the suspension was not confined to any particular format, such as debates, and was adopted prior to the time when the candidates and the networks proposed the Great Debates (Para. 25). The Commission also noted that, according to Sen. Pastore, the need for the 1960 legislation arose from the lack of time for the FCC to implement the 1959 amendments. Therefore, the Commission believed it had erred when it inferred from the Congressional action in 1960 suspending Section 315 that Congress must have decided that appearances in a debate format could under no circumstances qualify as a "bona fide news event" under Section 315(a)(4). A further indication that Congress had no such intent was found in Chairman Harris' statement during the House floor debate in 1959 that the elimination in committee of specific program categories from the exemption bill reported to the floor

did not mean that programs within those categories could not properly be found to come within the more general categories of "newscasts" or "on-the-spot coverage of news events." (Para. 24).

The Commission found that a careful reading of the legislative history shows that while many members of the House and Senate expressed reservations about granting, by way of the exemptions, such power to broadcasters, they voted to do so anyway. "We believe," the Commission said, "that when Congress adopted the 1959 Amendments it squarely faced the risk of political favoritism by broadcasters which might be created by the exemptions -- and, on balance, Congress preferred to make available to broadcasters the opportunity 'to cover the political news to the fullest degree.'" (Para. 29, quoting Senator Magnuson at 105 Cong. Rec. 14444).

Finally, the Commission was convinced that its narrow construction of Section 315(a)(4) in the 1962 decisions was inconsistent with the Congressional desire that two "worthy and desirable" goals be attained by the exemptions:

> First, the right of the public to be informed through broadcasts of political events; and Second, the discretion of the broadcaster to be selective with respect to the broadcasting of such events.

Para. 29 and 8, quoting Chairman Harris in the 1959 House Hearings).

ARGUMENT

I. THE COMMISSION'S INTERPRETATION OF THE MEANING OF THE LANGUAGE OF SECTION 315(a)(4) IS CONSISTENT WITH THE INTENT OF CONGRESS.

A. Congress Squarely Faced The Question Of Whether Section 315 Must Remain Absolute In Order To Ensure Fringe Candidates Exposure Equal to That Received By Major Party Candidates.

Section 18 of the Radio Act of 1927 (later adopted as Section 315 of the Communications Act) established a principle of absolute equality for all competing political candidates in the "use" of broadcast facilities. In 1959, Congress, while recognizing that principle, chose to limit such absolute equality by permitting exceptions to the "equal opportunities" requirement of Section 315. The Senate Report determined that an informed public was of greater importance than the principle of absolute equality for all candidates in all circumstances:

> ...[B]roadcasting is an integral part of our society and the public has become dependent upon this media [sic] for information, views, and facts. Broadcast journalism serves the public interest. It has made giant strides in the past 10 years through its distinctive capabilities to report directly and dramatically news of political campaigns to the people. This must be encouraged...

Sen. Rept. No. 562, July 22, 1959, at 13. See also Report at 10; Remarks of Senator Pastore, 105 Cong. Rec. 14440, 14448, 14451; Sen. Holland at 14451; and Senators Hartke and Proxmire at 14457.

Congress clearly took note of the unwillingness of broadcasters to expose the major candidates and their views to the public. That unwillingness, it understood, arose out of the requirement that, if one candidate were given news coverage time, every other candidate for that office must be given an equal opportunity. 10/ While Section 315 itself did not bar such coverage, Congress recognized that the practical effect of the law was to discourage broadcasters from providing news coverage of any candidate. 11/ See remarks of Rep. Harris, 105 Cong. Rec. 16227 (August 18, 1959).

10/ In 1956 there were at least 18 political parties with presidential candidates. The 16 parties other than the Democratic and Republican received less than 1% of the vote. Yet each candidate would receive time equal to that received by either the Democrat or the Republican. Thus candidates supported by 1% of the voters would receive 89% of the available time. In 1952 there were at least 14 candidates for President in addition to the Democrat and Republican (105 Cong. Rec. 14457), and in 1960 there were 16 candidates (J.A. 7-8). See also Buckley v. Valeo, 519 F.2d 821, 911 n.29 (D.C. Cir.), affirmed in part and reversed in part, 424 U.S. 1 (1976) (Bazelon, C.J., concurring in part and dissenting in part).

11/ That requirement was absolute. To illustrate the impact of this requirement, see testimony of Andrew J. Easter, Candidate for the Democratic Nomination for President, 1960 Sen. Hearings at 305-8.

In the House of Representatives the balancing of public policy considerations of equal time and news coverage was considered specifically. The House Report on the amendments said that "the public interest is served if the people of our country are well informed with respect to political events and public issues, particularly in order to make an informed choice among competing political candidates." H. Rept. No. 802, August 6, 1959, 4-5.

> In Jenness v. Fortson, supra, the Court recognized that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . . ." [403 U.S. at 442]. Congress was therefore entitled to take into account the obvious fact that there are differences in support among political movements.

Buckley v. Valeo, supra, 519 F.2d at 881. Faced with a choice between no broadcast news coverage of any candidate or some broadcast news coverage of major candidates with an attendant probability that "fringe" candidates would not receive "equal opportunities," Congress chose the latter.

B. Congress Rejected The Concept That Exemptions Be Granted on the Basis of the Type of Event, Instead Choosing to Create Exemptions Based on the Type of Media Coverage.

Having chosen to modify the equal opportunity provisions, Congress then had to consider how to create the

new exemptions. As is often the case in formulating a legislative remedy a variety of proposals were offered. The Senate and House committee each devised language which was drawn from several proposed bills. See e.g., S. 1585, S. 1604, S. 1858, S. 1929, H.R. 7122, H.R. 7180, H.R. 7216, H.R. 7602, H.R. 7985, 86th Cong., 1st Sess. (1959). The committees chose to focus on general types of news coverage rather than attempt to draft a specific list of particular events which might qualify as exempt. "The pending bill refers only to the type of political reporting that radio and television stations indulge in without having to provide equal time." Remarks of Rep. Celler, 105 Cong. Rec. 16226, Aug. 18, 1959 (emphasis added).

Congress chose to restrict the exemptions to "well defined categories." 105 Cong. Rec. 14440 (1959) (Sen. Pastore). The common theme of those categories was that they were created for news coverage. Coverage may be either bringing the event to the viewers directly from the scene or showing excerpts from the same event on a later newscast, or both. The essential concept of "covering" a news event is that the broadcaster's role is that of observer and reporter, rather than that of sponsor or director.[12/] Types

12/ Careful reading of the legislative history concerning §315 in both 1959 and 1960 reveals that there existed a marked difference in meaning between "coverage" and words such as "arrange" or "provide time." From the usage it is generally possible to determine whether the discussion is dealing with the broadcaster's action covering an event or sponsoring or directing an event (e.g., studio debate).

of program formats which were broader than news coverage were either dropped as specific formats from the list of exemptions (e.g., debates, panel discussions) or were modified by specific restrictive language (e.g., documentaries).

The suggestion that, because debates were not included as a specific exemption, coverage of such events cannot be exempt is unfounded. The Hartke bill (S. 1858) which specifically referred to debates proposed to exempt only studio debates, (i.e., under the exclusive control of the broadcaster as to format, production, content, presentation, length, time and all other details), such as those which occurred a year later in 1960.[13/]

13/ The suggestion that the 1960 suspension of Section 315 signalled Congress' intent not to include debates within the existing exemptions is without merit. The legislative history of Senate Joint Resolution 207 (P. L. 86-677), reveals clearly that Congress intended no such thing.

First, the 1960 suspension was much broader than the four exemptions since it suspended all equal opportunities in the presidential race. What Sen. Pastore apparently had in mind was granting adjacent 30 minute periods to the major party candidates so that each could deliver a set campaign speech. CBS President Frank Stanton disputed that back-to-back speeches were debates:

> Mr. Stanton. Then I don't think we ought to be talking about this as a bill for great debate because it isn't.
> Senator Pastore. All right, then.
> Mr. Stanton. This is a free time bill.
> Senator Pastore.... I don't think it can be argued on the ground that this thing is not a great debate, because these two men don't slug it out in the presence of one another. I think still, if you have them appearing one each on his own, addressing

(footnote continued on next page)

The most that could be concluded from the Committee's rejection of the Harke proposal is that Congress did not want studio debates. Indeed, all subsequent discussion of

13/ (footnote continued from previous page)

> the American people on the issues they are interested in, and the questions of the day that they should have knowledge of, and one follows the other, and next week they follow on again one another, maybe in the alternate fashion, I think you are getting a debate, without maybe running into a fracas.... What we are talking about here is allowing a candidate to address himself to the American public, as he has been doing right along, the only difference is that they have been buying that time and you have characterized it by saying this is nothing more than a free time bill. That is exactly what we are talking about.

1960 Sen. Hearings, at 184-5.

In fact, an amendment which would have required the use of free time for debates was withdrawn at the request of the resolution's floor leader. See 106 Cong. Rec. 13423-13428 (June 27, 1960).

Second, while debates had been proposed, the consideration of the suspension was nearly completed before it was clear that there might be debates. As of July 22 and 26, 1960, CBS and ABC had no plans for a debate. They wrote Chairman Harris that if S. J. Res. 207 were passed they would provide the Republican and Democratic nominees free time to be used as the candidates saw fit. On August 4, NBC responded to Rep. Harris with its plan for a series called "The Great Debate" and attached the acceptances of Vice-President Nixon and Senator Kennedy. Information Relating to Senate Joint Resolution 207, Committee Print, House Interstate and Foreign Commerce Committee, 86th Cong 2d Sess., August 1960. See also testimony by Gov. Adlai Stevenson, Sen. Hearings at 5-7. House passage of the resolution came on August 22, 1960.

Third, Congress enacted the suspension because the Commission had not had enough time to implement the 1959 exemptions from Section 315. See remarks of Sen. Pastore, 106 Cong. Rec. 13424 (June 27, 1960, daily ed.). See also, Aspen Institute, supra, paras. 25-26.

equal time and debates until after the 1962 Commission rulings centered on arranged studio debates, not coverage of debate events. Petitioners recall one debate (Br. 46, n.27) which was sponsored jointly by the Charleston (W. Va.) Gazette and WCHS-TV. That debate, too, was a studio debate, and consequently was not exempt. Nowhere in the legislative history is there any indication that all of the proposed categories were mutually exclusive, nor is there given any reason why an edited version of a debate may be presented in a newscast while an uncut, live broadcast could not be made from the "spot" of the event. That the various exemptions were not intended to be mutually exclusive is clearly shown by the remarks of Rep. Oren Harris, Chairman of the House Committee and the bill's floor manager:

> On the other hand, and I want you to get this, . . . the elimination of these categories by the committee was not intended to exclude any of these programs if they can be properly considered to be newscasts or on-the-spot coverage of news events.

105. Cong. Rec. 16229 (August 18, 1959).[14/] See Aspen Institute,

14/ Rep. Harris' remarks were preceded by remarks discussing various proposals advanced during the history of the legislation, and in the paragraph immediately preceding the quotation in the text, Chairman Harris said:

> [T]he subcommittee and the full committee decided to eliminate as separate categories news documentaries, panel discussions, and similar type programs as such. The committee felt . . . that these categories are simply too vague and cannot be defined with sufficient definiteness.

supra, para. 24. See also 105 Cong. Rec. 17782 (Sept. 2, 1959); (remarks of Rep. Harris). Cf. 105 Cong. Rec. 14455 (July 28, 1959).

In keeping with the focus on the type of news coverage of events rather than the events themselves, Congress chose to determine the bona fides of coverage by looking at the intent of the broadcaster rather than at the intent of the candidate. Thus, the language of the Conference Report limiting the exemption's application to cases "where the appearance of the candidate is not designed to serve the political advantage of that candidate," must be read in the context of the focus on types of coverage and the concern over potential broadcaster abuse. See Aspen Institute, supra, paras. 22-23. Taken in that context the common sense meaning of the language of the Report would read: "... where the appearance [on the medium] is not designed [by the broadcaster] to serve the political advantage of that candidate."

It is clear that "appearance" was used throughout the legislative history to refer to an appearance on the media, rather than an appearance at an event. This usage arose from the Commission's long-standing definition of a "use" of broadcast facilities within the meaning of Section 315(a), to be an "appearance of a candidate." FCC Public Notice 6385, FCC 58-936, October 1, 1958, Q. and A. 6 (quoted in H. Rept. No. 802, August 6, 1959 , 24). See e.g., the use

of "appearance" in the colloquy at 105 Cong. Rec. 16231. A realistic view of the language in the Report indicates that Congress did not intend to look at the candidate's intent, since a candidate always intends to advance his candidacy. 15/ The inclusion of political conventions as an example of a bona fide news event clearly indicates that Congress did not look to either the event or to the candidate's intent, but looked to the reasonableness and good faith of the broadcaster. Clearly an acceptance speech (and others) at a political convention is designed to advance the speaker's candidacy. 47 U.S.C. 315(a)(4). Moreover, Congress used such political conventions as one

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15/ Congressman Harris discussed the language in the floor debate on the conference report:

> ...[A]ppearance of a candidate in on-the-spot coverage of news events is not to be exempt from the equal time requirement unless the program covers bona fide news events.
>
> This requirement regarding the bona fide nature of the newscast, news interview or news events, was not included without thoughtful consideration by the conference committee. It sets up a test which leaves reasonable latitude for the exercise of good faith news judgment on the part of broadcasters and networks. However, it is not intended that the exemption shall apply where such judgment is not exercised in good faith. For example, to state a rather extreme case, the exemption from section 315(a) would not apply where the program, although it may be contrived to have the appearance or give the impression of being a newscast, news interview, or on-the-spot coverage of news events, is not presented as such by the broadcaster, but in reality has for its purpose the promotion of the political fortunes of the candidate making an appearance thereon. 105 Cong. Rec. 17782 (emphasis added).

example of "bona fide news events" rather than as the sole "news events" exception to the equal opportunity requirement by using the language "including but not limited to." 47 U.S.C. 315(a)(4).[16/]

C. Congress Fully Considered the Risks of the Exemptions, but Decided That The Benefits of Increased Political News Coverage Outweighed the Potential Dangers of Abuse.

The most significant concern exhibited by both Congressmen and Senators was that broadcasters would abuse

16/ Judge Wright's dissent (noted at Br. 40-41) suggests that the exemption was created only to allow on-the-spot coverage of apolitical events such as the Impeachment Inquiry debates. This view stems from the argument that the purpose of the 1959 amendment was only to overrule the Lar Daly decision and that for coverage to be exempt, the event must not be under the control of any candidate. This analysis fails to account for two factors: (1) the Lar Daly decision included coverage of political speeches in newscasts, and since 1959 political news coverage has included excerpts from stump speeches without, until now, any serious contention that such coverage was not exempt, and (2) Congress contemplated that news coverage of political campaigns would be exempt. See, e.g., colloquy between Senators Holland and Pastore:

> Mr. Holland. . . . [T]he purpose of the bill is not to benefit the politicians or the candidates or the station, but instead, to enable what probably has become the most important medium of political information to give the news concerning political races to the greatest number of citizens, and to make it possible to cover the political news to the fullest degree. Is that correct?
>
> Mr. Pastore. Certainly that is correct.

105 Cong. Rec. 14451. (emphasis added).

the exemptions and favor a particular candidate over all others. This recurrent theme appears again and again in the floor debates. 105 Cong. Rec. 14439-14463, 16223-16260, 17776-17782, 17827-17832(1959). Despite this concern, both the House and the Senate voted overwhelmingly to enact the conference bill.

In beginning the Senate debate on the bill, Sen. Pastore emphasized the belief that the risk of abuse was outweighed by the need for coverage of political news:

> In establishing this category of exemptions from section 315, the Committee was aware of the opportunity it affords a broadcaster to feature a favorite candidate. This is a risk the committee feels that is outweighed by the substantial benefits the public will receive through the full use of this dynamic media (sic) in political campaigns. . . .
>
> The committee feels that the proposal contained in this legislation is in the public interest and worth the risk being taken when contrasted with the alternative which is a blackout in the presentation of legally qualified candidates in the news type programs.
>
> * * *
>
> . . . The public benefits are so great that they outweigh the risk that may result from the favoritism that may be shown by some partisan broadcasters.

105 Cong. Rec. 14439-14440 (July 28, 1959).

In the beginning the House was less willing to accept the risks of abuse and developed the "incidental to" test, which included a number of factors to be used in evaluating

the reasonableness of the broadcaster's bona fide news judgment. H. Rept. No. 802, 5-7 (August 6, 1959). A great deal of discussion in the House Floor debates centered on the fears of Congressmen and the meaning of the "incidental to" language. The focus of that discussion was on the danger of abuse by the broadcaster and what criteria would be used to measure broadcaster performance. The final House bill retained the "incidental to" language.

However, the House managers receded from that position in the deliberations of the conference committee and the conference bill omitted the language and, thereby, the criteria it had represented.[17/] Chairman Harris told the House that "we have got a better bill in this conference report than we had in the bill which was reported by our

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17/ Chairman Harris indicated why the "incidental to" test was kept for documentaries, 47 U.S.C. 315(a)(3), but not for "other forms of newscasting" (i.e., the remaining exemptions):

> News documentaries were not exempt as a separate category under the House amendment, but they were under the Senate bill. The report of the House committee explained that the committee did not exempt news documentaries because some such programs might, to quote the language of the report, "go far beyond what is normally considered to be news." I feel that the limiting language in the conference substitute as to news documentaries, since such programs are named as a separate category, is appropriate to meet the point expressed in the report of the House committee. I do not think that there is a similar problem in the case of the other categories included in the conference substitute.

committee and passed in the House." 105 Cong. Rec. 17778 (1959). Instead of limiting language and conditions (other than those specified in the Conference Report), Rep. Harris explained that Congress could rely on more than the good faith of broadcasters:

> Now, just in case anybody in the broadcasting industry or in the Federal Communications Commission, or even a candidate himself, should get the idea that "The reins are off; you can do what you want to," we have accepted in the conference substitute a provision similar to what was referred to as the Proxmire amendment in the other body. This provision says that nothing in the foregoing sentence shall be construed as relieving the broadcasters in connection with the presentation of news, news interviews, documentaries, and on-the-spot coverage of news events from the obligation imposed upon them under this act to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Id. See also colloquy between Sen. Pastore and Sen. McCarthy, 105 Cong. Rec. 14445 (1959). Beyond that, the statute provided that Congress would reexamine the amendment to ascertain whether it was effective and practicable, and that the Commission would report to Congress annually on the exemptions. 105 Cong. Rec. 17829 (1959) (Sen. Pastore). Congress expected the FCC to act where licensees abused the discretion granted under the exemptions. 105 Cong. Rec. 14455 (1959) (Sen. Pastore and Sen. Long). Congress placed on the Commission

the responsibility of interpreting the statute and implementing it. 105 Cong. Rec. 14455, 17828, 17830.

Opposition to the Conference Report was led by Rep. Moss, who was the lone dissenter among the conferees. In the floor debate, Mr. Moss raised the same spectres of abuse and absence of standards raised here, 17 years later, by petitioners. Rep. Moss argued especially that without the "incidental to" test there existed no defined standard and that "bona fide" was too general. Chairman Harris disagreed in the words quoted in Aspen Institute, supra (para. 22, n.9), where he described the test as one which left "reasonable latitude for the exercise of good faith news judgment." Another member of the Conference stated that "'bona fide' as applied to . . . on-the-spot coverage, means that there shall not be any device or evasion to give an unfair advantage to any person." 105 Cong. Rec. 17831 (1959) (Sen. Scott). In the end "[t]he question was taken; and on a division (demanded by Mr. Moss), there were--ayes 142. noes 70." 105 Cong. Rec. 17782. The Report passed the Senate on a voice vote. Congress, therefore, rejected the narrow approach suggested then by Rep. Moss and now by petitioners.

II. THE COMMISSION REACHED ITS DECISION THROUGH PROPER APPLICATION OF THE PRINCIPLES OF STATUTORY CONSTRUCTION.

The Commission's analysis of the legislative intent behind the 1959 amendments began with the language of the statute itself. A program would be exempt from the equal opportunity requirement which was "on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto)." 47 U.S.C. 315(a)(4). From this language there appeared to exist a general exemption for news coverage direct from the scene of an event. The essential question was what constituted a "bona fide" news event, and who should make that determination.

In order to obtain the guidance of Congress, the Commission reviewed the entire legislative history to establish the context in which reports were issued and remarks were made. Beyond that context was the question of the relative weight to be given to the elements of the legislative history. The reports of the committees to which the bills were referred are "the most persusasive indicia of Congressional intent" where they set forth the grounds for recommending passage and the meaning of the statutory language. Housing Authority of the City of Omaha, Nebraska v. United States Housing Authority, 468 F.2d 1 (8th Cir. 1972); see United States v.

Five Gambling Devices, 346 U.S. 441 (1953), United States ex rel. Eichenlaub v. Shaughnessy, 338 U.S. 521 (1950); Spiegel's Estate v. Commissioner of Internal Revenue, 335 U.S. 701 (1949). Conference reports are accorded the same respect. NLRB v. Denver Building & Construction Trades Council, 341 U.S. 675 (1951); United States v. Pfitsch, 256 U.S. 547 551 (1921); SEC v. Sunbeam Gold Mines Co., 95 F.2d 799 (9th Cir. 1938). Therefore, the Commission examined carefully the committee reports, and relied especially on the Conference Report which, in some aspects, superseded the prior reports.

Particular weight is also to be accorded to the statements of committee members (often the committee chairman) who are leading the floor debates. On the contrary, little credence is to be granted to remarks by the bill's opponents:

> "'[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.' Labor Board v. Fruit & Vegetable Packers, 377 U.S. 58, 66. 'It is the sponsors that we look to when the meaning of the statutory words is in 341 U.S. 384, 394-395. See Mastro Plastics Corp. v. Labor Board, 350 U.S. 270, 288."

Woodwork Manufacturers v. NLRB, 386 U.S. 612, 639, 40. (1967). See also United Electric Coal Co. v. Rice, 80 F.2d [illegible], 8 (7th Cir. 1935). Thus, the Commission relied

greatly on the statements of Sen. Pastore, the subcommittee chairman and floor leader in the Senate, and Rep. Harris, House committee chairman and floor leader.

Testimony of witnesses in hearings are generally of little value in establishing legislative intent. Such testimony may be used to ascertain the evils which Congress sought to remedy by enacting legislation. However, it sheds little light on the meaning of specific legislative language, McCaughan v. Hershey Chocolate Co., 283 U.S. 488, 493 (1931), unless the drafter of the legislation testifies concerning the meaning of specific language ultimately enacted. See Davies Warehouse Co. v. Bowles, 321 U.S. 144, 150-51 (1944). Additionally, note that the caution prescribed for interpreting remarks in debates by the bill's opponents is applicable also to witnesses before a committee. Both groups attempt to sway legislative action in a favored direction and, consequently, may tend to overstate a position. 18/ In many cases both witnesses and legislators are uninformed or lack understanding concerning various facts or laws, resulting in statements which are unreliable. In re Carlson, 292 F. Supp. 778, 783 (C.D. Cal. 1968). It was for these reasons that the Commission avoided any undue reliance on the hearings.

18/ One would hardly expect, for example, a broadcaster seeking total repeal of §315 after 1959 to highlight the potential applications of the news exemptions.

The deletion later in the legislative process of language in a bill which has been reported by a committee is a significant indication that Congress did not intend such a construction to be imputed to the act. Carey v. Donohue, 240 U.S. 430 (1916). See also United States v. Henning, 344 U.S. 66 (1952); FTC v. Raladam Co., 283 U.S. 643, 648 (1931); Pennsylvania R. Co. v. International Coal Mining Co., 230 U.S. 184 (1913). However, provisions deleted prior to the committee report, and not subsequently considered in the floor debate, cannot be deemed rejected by the Congress. Therefore, the Commission correctly construed the intent of Congress in dropping the "incidental to" test and its attendant criteria when both houses accepted the Conference Report. The elimination of a "debate" exemption, however, occurred prior to the reporting of bills out of the Senate and House committees, and was only pertinent to whether studio debates would have their own exemption.

Hearings held subsequent to the enactment of legislation are of even less value than hearings held prior to action. United States v. Philadelphia Nat. Bank, 374 U.S. 321, 348-9 (1963). Conditions may change in the intervening period, as do the views of witnesses and those legislators still serving, inevitably coloring their interpretation of

the intent of Congress in prior actions. Accordingly, after reviewing later testimony in full context, the Commission found that it was of little value. 19/

Petitioners argue that the Commission may not overrule its prior interpretations. There are several interrelated elements in that contention. It is alleged that Congress was aware of the Commission's interpretation and did not indicate disapproval. It is then suggested that the inaction of Congress ratified the 1962 decisions by acquiescence and that the Federal Election Campaign Act of 1971 "reenacted" Section 315, thereby incorporating past administrative decisions such that they may be altered only by Congress (Br. 44-53). These arguments, however, do not withstand analysis.

The record of legislative proceedings after the enactment of the news exemptions shows that while Congress may have been aware of the Commission's views concerning on-the-spot news coverage, that awareness was limited. Subsequent hearings show a concentration of comment and proposal on statutory action to abolish the equal opportunity

19/ Petitioners, however, rely extensively on subsequent hearings which generally did not directly address the scope or interpretation of the 1959 amendments. The focus of those proceedings was on allowing all (including studio) debate appearances to be exempt per se or on abolishing equal opportunities entirely.

requirement or to amend the law to permit studio debates such as The Great Debates. SWP's contention (Br. 51) that "at no time" did Congress suggest that Wyckoff was erroneously decided is erroneous. During the 1963 House Hearings, FCC Chairman Minow said that there were some close decisions in applying the language of the exemptions and cited the Brown-Nixon debate as an example.

Committee Chairman Harris asked Minow whether the debate was not bona fide news. Minow said that the Commission had said it was not, to which Harris replied: "What do you think is meant by 'on-the-spot coverage of news, including but not limited to political conventions and activities incidental thereto?'" Minow deferred to Commissioner Ford to discuss the decision, and Ford related the reasons given by the Commission particularly the danger of abuse.

> Mr. Harris: I don't know whether I see it that way at all, Commissioner.
>
> Mr. Ford: I may be wrong.
>
> Mr. Harris: Is not the bringing together of two major political candidates in a hall where there is a large crowd present, is not that a bona fide news event? Perhaps, I do not appreciate the definition of bona fide news event .... Are we going to deprive the people under this strict interpretation which you suggest here, of the broadcasting of this event?

While indicating clearly his dim view of the Commission's interpretations, Harris recognized that the decision was already made and accepted that fact. Political Broadcasts - Equal Time, Hearing, House Commerce Committee, 88th Cong., 1st sess, 1963, 65-67. The Commission failed to take the hint by Harris, and continued to maintain its position on §315(a)(4). That Congress failed to rush into action to overrule Wyckoff and Goodwill Station may be more attributable to the pace of legislative action and to pressing concerns in other areas rather than to silent approval of those rulings.[20/] Attributing legal significance to Congressional inaction is a "shaky business." Power Reactor Development Co. v. International Union of E.R. & M. Workers, 367 U.S. 396, 409 (1961). The failure of Congress to repudiate particular decisions is "the most dubious foundation" from which to claim agreement by Congress with those decisions. United States v. Price, 361 U.S. 304 (1960). "Where . . . there is

20/ "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . Congress may not have had its attention directed to an undesirable decision. ... Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction ... of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation controlling legal principle." Helvering v. Hallock, 309 U.S. 106, 120-21 (1940).

no indication that a subsequent Congress had addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone . . . approval." Zuber v. Allen, 396 U.S. 168, 186 n.21 (1969).[21/]

After reviewing the legislative history, the Court in Chisholm concluded that:

> Congressional inaction in this instance is entirely consistent with the interpretation that Congress was willing to leave to the Commission the interpretation of the exemptions as they applied to specific program formats.

Slip Op. 27; see also slip op. 28-29, and the court's discussion at 15-18. Moreover, it is clear that subsequent to the Commission's decision in Wyckoff and Goodwill, it was the conventional wisdom that since the Commission had spoken, legislation was the only way that debates could be broadcast. That view was strengthened by the Commission's reliance, in 1964, on those two cases when ruling on Presidential news conferences in Columbia Broadcasting System.[22/]

21/ In Kay v. FCC, 443 F.2d 638 (1970), the Court, after reaching its own decision on the merits, cited the lack of Congressional action to change an FCC ruling first made in 1948, as merely "an added circumstance."

22/ It is noteworthy that Congress did not consider the news exemptions in 1971, but was concerned with reforming political campaign finance activities.

III. THE COMMISSION'S DECISION IN ASPEN WAS A REASONABLE EXERCISE OF ITS STATUTORY AUTHORITY.

Congress clearly intended to leave to the Commission the task of implementing the general language in the Communications Act. See 47 U.S.C. §303(r). That intent was intensified in the area of equal opportunities under 47 U.S.C. §315, by the language of the Senate Report placing upon the Commission the task of interpreting the statute by rule, negotiation and interpretation. S. Rept. No. 562, 86th Cong., 1st Sess. 12 (1959). But Congress did more than that. It went so far as to write into Section 315 the requirement: "The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section." 47 U.S.C. 315(d).

It was pursuant to this mandate that the Commission subjected the petition of Aspen Institute and the entire legislative history concerning the 1959 amendment to considerable scrutiny. After an exhaustive study of the history and after extensive comment by interested parties the Commission reached its decision to reverse the decisions which had been made in Goodwill Station and Wyckoff. The Commission's decision, Aspen Institute, supra, clearly states the basis for the change in interpretation and the reasons which warranted the reversal of the 1962 decisions.

The Supreme Court has said that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). See also Udall v. Tallman, 380 U.S. 1, 16 (1965). In reviewing Commission decisions, the court should not overrule the Commission unless the Commission's decision is arbitrary or contrary to the public interest as a matter of law. Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969). Here, the SWP seeks to relitigate the issue decided by the Commission in Aspen Institute, supra, which decision was upheld on review in Chisholm, supra. However, the SWP has failed to show that the Commission's decision was arbitrary, nor has it proved it to be against the public interest. The court of appeals in Chisholm decided that "deference [to the Commission's decision] is especially appropriate where, as here, Congress has opted for legislative generality, leaving the agency with the task of evolving definitions on a case-by-case basis." Slip op. 18, 31-32.

CONCLUSION

For the foregoing reasons, the order of the Commission here under review should be upheld and the petition for review should be denied.

Respectfully submitted,

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September 27, 1976.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOCIALIST WORKERS PARTY, et al., Petitioners,	)	
v.	)	No. 76-4213
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Respondents.	)	

CERTIFICATE OF SERVICE

I, Mary C. Ross, hereby certify that the foregoing "Brief for Respondents" was served this 27th day of September, 1976, by mailing true copies thereof, to the following persons at the addresses below:

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